

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHELLY KAY LAIDLAW,

Defendant-Appellant.

UNPUBLISHED

August 6, 2009

No. 281867

Oakland Circuit Court

LC No. 2007-212601-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL CHESTER GAGNIER,

Defendant-Appellant.

No. 281868

Oakland Circuit Court

LC No. 2007-212596-FC

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

In Docket No. 281867, defendant Shelly Kay Laidlaw appeals as of right her bench conviction of third-degree fleeing or eluding a police officer. MCL 750.479a(3). The trial court sentenced Laidlaw to 8 to 20 years' imprisonment. In Docket No. 281868, defendant Paul Chester Gagnier appeals as of right his bench conviction of bank robbery. MCL 750.531. The trial court sentenced Gagnier as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment. On appeal, both defendants challenge the propriety of the trial court's sentencing decisions. Because we conclude that the trial court did not err when it sentenced either defendant, we affirm in both cases.

I. Appeal in Docket No. 281867

In Docket No. 281867, Laidlaw argues that the trial court erred when it departed from the sentencing guidelines range without stating a substantial and compelling reason for the departure.¹

A trial court may depart from the sentencing guidelines range “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3). A substantial and compelling reason must be objective and verifiable, must “keenly” or “irresistibly” grab the court’s attention, and must be recognized as being of considerable worth in deciding the length of a sentence. *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). The “objective and verifiable” requirement “mean[s] that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, a departure may not be based on characteristics already taken into account in determining the appropriate sentencing guidelines range unless the court determines from facts in the record that the particular characteristic at issue has been given inadequate or disproportionate weight. MCL 769.34(3)(b). Finally, in order for “a departure to be justified, the minimum sentence imposed must be proportionate to the defendant’s conduct and prior criminal history.” *Smith, supra* at 300.

This Court reviews for clear error a trial court’s factual determination that a particular factor exists. *Id.* We review de novo a trial court’s determination whether a particular factor is objective and verifiable. *Id.* In addition, we review for an abuse of discretion a trial court’s determination that objective and verifiable factors constitute substantial and compelling reasons to support a sentencing guidelines departure. *Id.* Finally, we review the extent of a departure for an abuse of discretion. *Id.*

Here, the trial court departed from the sentencing guidelines range of 7 to 46 months,² in part, based on its determination that Laidlaw “must have known” that she was helping Gagnier flee. The trial court also based its departure on Laidlaw’s extensive criminal and substance abuse history, her failure to rectify her behavior despite previous probation and jail sentences, and the fact that she led the police on a high-speed chase that endangered the lives of others.

Laidlaw argues that the trial court’s determination that she must have known that she was helping Gagnier flee after he committed a crime was not objective and verifiable because it was incapable of being confirmed. See *Abramski, supra* at 74. Although the trial court referred to

¹ We note that Laidlaw has not challenged the degree of the trial court’s departure; she has only challenged whether the stated reasons for departing were legally sufficient. Therefore, we shall limit our analysis accordingly.

² Although Laidlaw asserts that her sentencing guidelines range was 10 to 46 months, the trial court changed the scoring of OV 16 during sentencing, resulting in a corrected guidelines range of 7 to 46 months.

what Laidlaw must have known given her prior criminal record and the circumstances surrounding the commission of the crime, we do not agree that this reference indicates that the trial court improperly based its decision to depart on factors that were not objective and verifiable. Taken in context, the trial court's reason for departing was that it found that Laidlaw acted as an accessory to Gagnier's robbery by helping him flee. Although the trial court found that the prosecution failed to prove beyond a reasonable doubt that Laidlaw was guilty of bank robbery, that finding did not preclude the trial court from finding by a preponderance of the evidence that Laidlaw participated in the robbery. See *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). Further, the evidence cited by the trial court is objective and verifiable and supports the finding by a preponderance of the evidence that Laidlaw aided Gagnier's robbery by helping him flee. Likewise, because her aid was not reflected in the scoring of the sentencing guidelines, the trial court could properly consider it in determining whether to depart. Therefore, the trial court did not err in this regard.

The trial court also departed on the basis of Laidlaw's lengthy substance abuse history and numerous prior convictions and sentences, which had failed to deter her criminal behavior. These reasons are also objective and verifiable. Laidlaw admits that her criminal history is directly related to her efforts to obtain money to purchase drugs. The record shows that Laidlaw has an extensive criminal history involving numerous prior convictions, most of which are misdemeanors. The sentencing guidelines do not account for the extent of Laidlaw's criminal history: Laidlaw has more than three times the number of prior convictions necessary to score 20 points for Prior Record Variable (PRV) 5. See MCL 777.55. In addition, Laidlaw's criminal history objectively and verifiably evidences that she is unable to conform her conduct to the requisites of the law. As such, the trial court stated that it was not concerned with rehabilitation, but was concerned only with protecting the community. Considering Laidlaw's criminal history and failed attempts at rehabilitation, these factors constituted substantial and compelling reasons supporting the trial court's departure.

The trial court also departed from the guidelines based on the fact that Laidlaw led the police on a high-speed chase that endangered the lives of others. The record supports the trial court's finding. During trial, the prosecutor played a video of the police chase that showed Laidlaw traveling at speeds exceeding 100 miles an hour. It also showed her cutting in front of a school bus to exit the freeway, driving on the sidewalk to avoid cars ahead of her, passing cars on the shoulder of the freeway, traveling through red lights, and weaving in and out of traffic while traveling at high speeds. The recording plainly demonstrates the hazard that Laidlaw's conduct posed to others. Thus, this factor is objective and verifiable, and the trial court did not abuse its discretion when it determined that this factor constituted a substantial and compelling reason supporting an upward departure.

The trial court did not err when it elected to depart from the sentencing guidelines.

II. Appeal in Docket No. 281868

On appeal, Gagnier challenges the trial court's scoring of Offense Variables (OVs) 1, 4, and 14. Gagnier properly preserved these challenges by objecting to the scoring of these variables during sentencing. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

We review for clear error a trial court's factual findings at sentencing. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). The proper application of the statutory sentencing guidelines is a question of law that this Court reviews de novo. *Id.* A sentencing court has discretion in determining the number of points to be assessed for each variable, provided that record evidence adequately supports a given score. *Endres, supra* at 417. "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

The trial court assessed five points for OV 1, which provides that five points should be scored if "[a] weapon was displayed or implied." MCL 777.31(1)(e). Gagnier contends that, because the trial court acquitted him of armed robbery based on its finding that a gun was not displayed or implied, OV 1 should have been scored at zero. Gagnier misconstrues the trial court's factual findings. A review of the record shows that trial court did not find that Gagnier did not display or imply a weapon. Rather, the court found that the bank teller, Michelle Wilson, was unaware that Gagnier was implying that he had a gun. The trial court determined that Wilson was unable to read the "minute" print on the demand note that referred to shooting. In addition, the court noted that Wilson was impeached with her prior testimony stating that she assumed that Gagnier's hands were in his pockets and never assumed that he had a gun. Thus, the court determined that Wilson was unaware that Gagnier implied that he had a gun during the robbery and acquitted him of armed robbery on this basis.

Nevertheless, the trial court could properly score five points for OV 1 because there was evidence that Gagnier implied that he had a gun. Although the note was torn when the police recovered it from the floor of the bank, it is possible to decipher the words "start shooting" toward the end of the note. Thus, although Gagnier maintained during trial that he tore the note to remove the reference to "shooting," even if true, a reader would have been able to read the word "shooting" on the note. In any event, contrary to Gagnier's testimony, Wilson testified that the note was fully intact when Gagnier handed it to her and that she tore it with her shoe as she kicked it toward her coworker. Moreover, a video of the robbery showed Gagnier's right hand in his pocket and his elbow extended outward as if to demonstrate that he had a gun. Accordingly, there was sufficient evidence to warrant the scoring of OV 1 at five points.

Gagnier also argues that he should not have been scored ten points for OV 4, which involves psychological injury to the victim. MCL 777.34(1)(a) states that ten points should be scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." Further, MCL 777.34(2) directs that ten points should be scored "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." The record supports the trial court's scoring of this variable. Wilson testified that when Gagnier handed her the robbery note, she was anxious and fearful that the situation would escalate into violence. In addition, she indicated that she feared for her life and that of her pregnant coworker during the robbery, and that her doctor had increased her anxiety medication as a result of the incident. She also stated that she has difficulty sleeping and fears that Gagnier will retaliate when he is released from prison. Therefore, there was sufficient evidence to warrant the scoring of this offense variable.

Gagnier also argues that he should not have been assessed ten points under OV 14 for being a "leader in a multiple offender situation." MCL 777.44(1)(a). Gagnier argues that Laidlaw was not convicted of bank robbery and that the trial court specifically determined that she was unaware of Gagnier's intent to rob the bank. MCL 777.44(2)(a), however, directs that

“[t]he entire criminal transaction should be considered when scoring this variable.” Immediately after the bank robbery, Laidlaw sped away from the scene and acted as the “getaway” driver. She led the police on a high-speed chase in an effort to help Gagnier avoid apprehension. Therefore, considering the entire criminal transaction, the trial court could properly conclude that Gagnier took on a leadership role.

Gagnier next argues that the trial court erred when it elected to depart from the sentencing guidelines. Specifically, Gagnier contends that the trial court erred by failing to state a substantial and compelling reason for the departure. As previously discussed, Gagnier’s challenges to the scoring of OV 1, 4, and 14 are meritless. Further, as later discussed, *infra*, his challenges to the scoring of OV 9 and 19 likewise lack merit. Therefore, his sentencing guidelines were properly scored and provided a minimum sentence range of 43 to 172 months after his fourth habitual offender enhancement. The trial court departed from this range based on the fact that Gagnier committed this bank robbery only 14 months after being released from parole for his previous bank robbery conviction and that he continues to commit bank robberies despite previous jail and prison sentences, which had proven ineffective to put an end to his behavior.

Gagnier argues that the trial court’s reasons were already accounted in the scoring of his PRVs and that the court erred because it did not find that these factors were inadequately considered. Although the PRVs take into account an offender’s general criminal history, the PRVs do not account for the fact that this was Gagnier’s fourth bank robbery and that he was released from parole for committing a previous bank robbery only 14 months before he committed this robbery. As the trial court noted, Gagnier has been incarcerated for a large part of his adult life, but this fact has had no deterrent effect on his extreme recidivism. Also as the trial court noted, Gagnier has fled parole and escaped from jail, demonstrating his noncompliance with previous sentences. This factor was not accounted for in the scoring of the PRVs. Accordingly, the trial court recognized that rehabilitation was not a likely goal and that society needed to be protected from Gagnier’s continuing criminal behavior. A defendant’s repeated offenses and failures at rehabilitation are objective and verifiable factors that may justify an upward departure. *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008). In short, the trial court did not abuse its discretion by determining that Gagnier’s extreme recidivism and noncompliance with previous sentences and conditions of parole constituted substantial and compelling reasons to depart from the sentencing guidelines.

Gagnier also argues that the extent of the departure is disproportionate to the offense. The guidelines allowed for a minimum sentence of not more than 172 months, but the trial court determined that Gagnier should serve a minimum of 240 months’ imprisonment. Thus, the trial court sentenced Gagnier to serve a minimum sentence that was more than five years longer than the highest recommended minimum sentence. As already noted, the trial court articulated substantial and compelling reasons for departing from the recommended minimum sentence. However, it is not sufficient for a trial court to state a substantial and compelling reason for a departure: “the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the *particular* departure made.” *Smith, supra* at 303 (emphasis in original). Further, “[a] sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.” *Id.* at 304.

Here, it is evident that the trial court departed based on Gagnier's demonstrated unwillingness to refrain from robbing banks. Indeed, the trial court determined that, based on Gagnier's recidivism, rehabilitation was not a reasonable goal. Instead, the trial court selected Gagnier's sentence based on society's need for protection. Hence, the only question is whether the actual length of the departure—adding more than five years to Gagnier's minimum sentence—was proportionate to the seriousness of Gagnier's conduct in light of his criminal record. *Id.* at 304-305. “[E]verything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment.” *Id.* at 305, quoting *People v Babcock*, 469 Mich 247, 259; 666 NW2d 231 (2003).

Our Supreme Court has explained that one means by which courts can measure whether a sentence is proportionate is to refer to the sentencing grid:

Certainly, a trial court that is contemplating a departure is not *required* to consider where a defendant's sentence falls in the sentencing range grid. However, we think that reference to the grid can be helpful, because it provides objective factual guideposts that can assist sentencing courts in ensuring that the “offenders with similar offense and offender characteristics receive substantially similar sentences.” [*Smith, supra* at 309, quoting *Babcock, supra* at 267 n 21, quoting former MCL 769.33(1)(e)(iv).]

For that reason, we shall exam Gagnier's sentence in light of the applicable sentencing grid to determine whether the trial court's departure is proportionate given Gagnier's conduct and criminal record. *Smith, supra* at 304-305.

Although Gagnier's OV level (level IV) is in the middle to upper range of the sentencing grid pertaining to bank robbery, MCL 777.64, his PRV level (level E) is at the high end of the grid. In fact, if Gagnier had been assessed only five additional PRV points, the sentencing guidelines would have allowed for a minimum sentence of 200 months after his fourth habitual offender enhancement. Moreover, if a mere five points were added to both his PRV and OV scores, the sentencing guidelines would have allowed for a minimum sentence of 228 months after his sentencing enhancement. From this, it is evident that the Legislature determined that defendants with extremely high rates of recidivism should be sentenced to minimum terms within the range selected by the trial court in this case. The sentencing grid demonstrates that Gagnier's 240-month minimum sentence is not wholly disproportionate for an offender with such an extensive criminal history. Accordingly, we cannot conclude that the trial court abused its discretion by imposing a 68-month upward departure.

In his Standard 4 brief on appeal, Gagnier also argues that OVs 9 and 19 were improperly scored and that his counsel was ineffective for failing to object to the scoring of OV 9.

Offense variable 9 pertains to the number of victims. At the time that Gagnier committed the bank robbery, MCL 777.39 provided that ten points should be scored under OV 9 if “[t]here were 2 to 9 victims.”³ MCL 777.39(2)(a) directed a trial court to “[c]ount each person who was

³ MCL 777.39 was amended by 2006 PA 548, but the amendment did not take effect until March
(continued...)

placed in danger of injury or loss of life as a victim.” Our Supreme Court has recognized that OV 9 may be scored for multiple victims in robbery cases if, although only one victim was robbed, other individuals were present at the scene of the robbery who were placed in danger of injury or death. *People v Sargent*, 481 Mich 346, 350-351 n 2; 750 NW2d 161 (2008). Because both Wilson and her coworker were present during the robbery, they were both placed in danger of injury or loss of life. Gagnier contends that, because he was not armed, no victim was placed in danger of physical injury. Gagnier’s argument lacks merit. As this Court recognized in *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988), “in the event of police or other third-party apprehension intervention, each individual in the bank at the time of the robbery was a victim subject to possible injury or death.” Although *Day* involved the judicial sentencing guidelines, this reasoning is equally applicable here. Therefore, Gagnier was properly scored ten points for OV 9. Likewise, because OV 9 was properly scored, Gagnier’s trial counsel cannot be faulted for failing to object to its scoring. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

For OV 19, MCL 777.49(c) directs trial courts to score ten points if the defendant “interfered with or attempted to interfere with the administration of justice” The trial court determined that ten points were warranted under OV 19 because Gagnier ran from the police after the high-speed chase. The trial court’s determination was proper. See *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

Therefore, there were no sentencing errors warranting relief.

Gagnier next argues that his presentence investigation report (PSIR) is inaccurate and that counsel was ineffective for failing to challenge the erroneous information. “This Court reviews a trial court’s response to a defendant’s challenge to the accuracy of a PSIR for an abuse of discretion.” *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008). If a defendant challenges the accuracy of information in a PSIR, the trial court must respond. *Id.* at 182. “The court may determine the accuracy of the information, accept the defendant’s version, or simply disregard the challenged information.” *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). If the court disregards the challenged information, it must clearly indicate that it did not consider the information in determining the defendant’s sentence. *Id.* at 649. Further, if the court determines that the information is inaccurate or irrelevant, it must strike the information from the PSIR before sending a copy of the PSIR to the Department of Corrections. *Id.*

We shall first address the challenges Gagnier preserved by raising them before the trial court.

Gagnier challenges the PSIR’s indication that “[t]his is his fourth bank robbery arrest.” During sentencing, the prosecutor argued that the trial court should exceed the guidelines because this offense was Gagnier’s fourth bank robbery. Defense counsel responded that this was Gagnier’s third bank robbery, not his fourth, stating, “there were two prior bank robberies with multiple counts from – as I read them.” Counsel was thus referring to the PSIR, which

(...continued)

30, 2007, after Gagnier committed the bank robbery.

indicates that Gagnier was twice previously convicted of bank robbery. The PSIR also indicates, however, that Gagnier robbed two banks in Florida within 4 days in 1996 and that one of the charges was dismissed as part of a plea agreement. Therefore, the PSIR accurately indicates that the present offense was Gagnier's "fourth bank robbery arrest."

Gagnier next challenges the statement in the PSIR that Wilson reported that she was afraid for her life and that Gagnier had threatened to shoot her. The trial court did not abuse its discretion by failing to strike this information, which is consistent with Wilson's trial testimony. Although in rendering its verdict, the trial court opined that Wilson was unaware that Gagnier implied that he had a weapon during the robbery, the PSIR explicitly reflects Wilson's report of the incident, not the facts as determined by the trial court. Thus, the information is not erroneous.

Gagnier next argues that the PSIR should be amended to indicate that his "Charge at Arrest" for his February 6, 2007, conviction was possession of paraphernalia and not possession of marijuana. He contends that he had no marijuana and was never charged with marijuana possession. The discussion at sentencing, however, revealed that Gagnier was initially charged with marijuana possession, but that the charge was reduced to possession of paraphernalia. The PSIR was corrected to reflect a final charge of possession of paraphernalia. The PSIR's indication that possession of marijuana was the "Charge at Arrest," however, appears to be accurate. Thus, Gagnier's claim of error lacks merit.

We shall next address Gagnier's unpreserved claims of error with respect to the PSIR. We review these unpreserved claims for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

Gagnier also contends that the "Evaluation and Plan" is contradictory in that it indicates that he has an eleventh grade education, but also states that he earned his Associate's Degree in 2006. The PSIR is not contradictory and properly summarizes Gagnier's education. The PSIR states that Gagnier earned his GED while serving in the Army and that he earned his associate's degree from Baker College in 2006. The PSIR further states that he attended Montcalm Community College in 1990-1991, that his area of study at Baker College was computer information systems, and that he had a 3.74 grade point average. Accordingly, there was no error.

Gagnier next challenges the PSIR's indication that, in all of his prior bank robberies, he presented a demand note indicating that he was armed. Gagnier has failed to establish error; there is no record evidence that this statement is false. Indeed, the summary of Gagnier's prior arrests and convictions indicates he did use demand notes that implied that he had a gun for both the bank robberies in Florida. Moreover, Gagnier testified that on the day of this robbery, he was carrying two copies of the demand note used in the robbery. Further, the police found a map to another bank saved in a file on his computer. Therefore, the evidence tended to show that it was Gagnier's practice to use demand notes such as the one in this case in his bank robberies.

Gagnier next challenges the PSIR's indication that he fled the state while on parole in 2004. He contends that he was paroled to Florida from Michigan and was later arrested in Florida, where he was properly located. The record is devoid of any evidence supporting Gagnier's claims, and the contents of a PSIR are presumptively accurate if unchallenged during

sentencing. *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987), abrogated on other grounds *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997). Further, on appeal, Gagnier presents only his self-serving rendition regarding why he was in Florida while on parole. Thus, he has failed to establish error warranting relief.

Gagnier next argues that the PSIR's assertion in the "Evaluation and Plan" section that he implied that he had a gun and would start shooting is erroneous because the trial court acquitted him of armed robbery. As previously discussed, the acquittal was based on the trial court's determination that Wilson was unaware of Gagnier's implications that he had a gun. The trial court made no finding that Gagnier did not imply that he had a gun and in fact scored five points for OV 1 based on its determination that he displayed or implied a weapon. Therefore, Gagnier has failed to establish plain error.

Gagnier next challenges the PSIR's indication that "this is the fourth time the defendant has robbed a bank using a demand note and threatening to have a gun[.]" He argues that this statement should be changed to reflect that this offense was his third bank robbery and that he did not threaten that he had a gun in any bank robbery. As previously discussed, this offense was in fact Gagnier's fourth bank robbery and he threatened to "start shooting" when he committed this offense. The record fails to establish that he did not present a demand note threatening to shoot in his prior bank robberies. Thus, he has failed to establish plain error.

Gagnier next argues that the contents of the demand note should be omitted from the PSIR because the trial court found that Wilson read only the first line of the note. The police recovered the note, which was introduced as evidence during trial, and the PSIR accurately reflects its contents. Gagnier fails to indicate why the PSIR should not recite the contents of the note simply because the trial court determined that Wilson read only the first line.

Gagnier next challenges the inclusion of the phrase, "implied with his hands in his pocket that he had a gun." He argues that the trial court specifically determined that Wilson assumed that only his hands were in his pockets. Despite the trial court's finding, a video of the robbery showed Gagnier's right hand in his pocket and his arm in a position as if to demonstrate that he had a gun in his right hand. Accordingly, the evidence supports the inclusion of this statement in the PSIR.

Gagnier next argues that the reference to Michael Laidlaw's statements should be omitted from the PSIR because the trial court determined him to be incredible. Regardless of the trial court's findings, the PSIR describes the agent's version of events and what Michael told the police. The fact that the trial court found Michael's trial testimony incredible is irrelevant to the agent's description of the offense. Accordingly, Gagnier has failed to establish plain error.

Gagnier next argues that he did not imply that he had a gun in his prior bank robberies and that the reference to a gun should therefore be removed from the PSIR. As discussed previously, Gagnier's claim is self-serving and no evidence indicates that he did not imply that he had a gun in the previous bank robberies.

Finally, Gagnier argues that the reference to a charge of third-degree fleeing or eluding a police officer with respect to this case should be removed from his PSIR because he was never charged with that offense. The record shows that Gagnier was arrested on charges of armed

robbery, bank robbery, and third-degree fleeing or eluding a police officer, although he was not tried on the fleeing or eluding charge. Accordingly, the PSIR's reference to this charge as count III of Gagnier's "Charge(s) at Arrest" is accurate. Further, because none of Gagnier's unpreserved challenges to the information contained in his PSIR is meritorious, counsel was not ineffective for failing to assert these challenges during sentencing. *Toma, supra* at 302-303.

Gagnier next argues in his Standard 4 brief that his OV's were improperly scored based on facts that were not proven beyond a reasonable doubt contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v McCuller*, 479 Mich 672, 677; 739 NW2d 563 (2007), our Supreme Court determined that under Michigan's indeterminate sentencing scheme, a sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the OV's to determine a defendant's minimum sentence. Therefore, Gagnier's argument lacks merit.

There were no errors warranting relief in either case.

Affirmed in both cases.

/s/ Christopher M. Murray

/s/ Michael J. Kelly